SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

vs.

WILLIE RICHARDSON, FOSTER DASH, and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

In all three cases,

Did the court below err in holding that the allegation, that a guilty plea is involuntary because it is based upon a coerced confession, stated a claim for relief under the Fourteenth Amendment entitling respondents to a hearing?

In Richardson,

1. Did the court below err in holding that the further allegation, that the respondent pleaded guilty instead of going to trial and raising the coerced con-

fession claim because court-assigned counsel was incompetent and misled him as to the effect of the plea as a waiver, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty because court assigned counsel only conferred for ten minutes with him in a capital case, stated an independent claim for relief under the Fourteenth Amendment?

In Dash,

1. Did the court below err in holding that the further allegation that the respondent pleaded guilty instead of going to trial on the coerced confession claim because court assigned counsel, though competent, advised him that the only way of raising the claim at trial was one which was inherently unreliable and which did not avert the danger of a conviction even if the confession were found involuntary, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty by the trial judge's threat to impose the maximum sentence if he went to trial, stated an independent claim for relief under the Fourteenth Amendment?

In Williams,

1. Did the court below err in holding that the further allegation that the respondent pleaded guilty instead of going to trial and raising the coerced confession claim because court assigned counsel refused

to investigate his case and because counsel also told him that the only way of raising the claim at trial was one which was inherently unreliable and which did not avert the danger of conviction even if the confession were found involuntary, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty where assigned counsel failed to investigate an alibi defense and misled him by telling him he was pleading to a misdemeanor, stated an independent claim for relief under the Fourteenth Amendment?

Statement

Each case here for review was brought and decided separately below. Each case involves one common question of law (Point I, *infra*) but otherwise presents different questions of law for review although the petitioners have treated all three cases together. Accordingly, three separate statements of fact, as well as separate arguments for each case, are made.

1. Willie Richardson

Richardson was convicted on October 9, 1963, in Supreme Court, New York County, upon his plea of guilty of the crime of murder, second degree, and sentenced to a term of thirty years to life imprisonment. After indictment and through sentence, he was represented by two court assigned attorneys (A. 105). The minutes of plea show *inter alia* that Richardson admitted the homicide (A. 91) and stated that he was not threatened by anyone or promised anything in order to induce him to plead (A. 90).

Some eight months after sentence, Richardson moved *pro se* in the court of conviction to have his conviction vacated on the ground that his plea was induced by the fact he had been coerced into confessing his guilt (A. 84). Relief was denied without a hearing, and this ruling was affirmed on appeal[1] (A. 84).

A month after the highest state court denied leave to appeal, Richardson, still acting *pro se* filed the *habeas corpus* petition upon which, together with the supplemental affidavit (A. 101-104) filed later with the assistance of court assigned counsel, this litigation is based.

Richardson alleged that he was present during an altercation between two relatives but that he did not commit the homicides (A. 78, 101). On March 24, at 2:30 p.m. he was picked up by the police for questioning and taken to the station house (A. 78, 102). He was handcuffed (A. 102) and interrogated (A. 78, 102). Since he was on parole, he asked permission to contact an attorney he knew and whom he named, but the police refused (A. 78, 102). In his original petition, Richardson stated that "after incessive abuse, threats and questioning I was finally coerced and forced to sign a confession against my will, implicating myself in something I had nothing to do with . . . "(A. 78).

In the supplemental affidavit, he amplified this by stating that the police threatened him verbally and physically beat him on his face and stomach and other parts of his body, and that after more than an hour of threats and beatings, he agreed to confess (A. 102). Richardson stated he signed the confession in order to stop the beating (A. 103).

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[1] Counsel was appointed for purposes of the Appellate Division appeal (A. 77).

On April 11, Richardson was indicted for first degree murder (A. 105) and a week later, Alfred Rosner, and a co-counsel, were assigned to represent him (A. 103).[2]

In his *pro se* petition, Richardson alleged that court assigned counsel and the District Attorney coerced him into pleading against his will and then denied him the right to withdraw the plea[3] (A. 82) and that counsel failed to make appropriate objections (A. 81, 82) and made no effort to protect Richardson's rights (A. 82). Richardson alleged that he was denied the effective assistance of counsel (A. 82).

In the supplemental affidavit, Richardson stated that Rosner came to see him for ten minutes before the date of the plea (A. 103). Rosner took no notes, and did not mention what he intended to do to help Richardson (A. 103). Rosner told him "he would get paid the same amount of money for representing me regardless of the outcome" (A. 103).

Richardson states he next saw Rosner on the day of the plea, and at that time the attorney told him to change his plea from not guilty to guilty of murder second degree (A. 103). Richardson protested, saying that he did not want to plead to a crime he didn't commit (A. 103-104). Richardson told the attorney that the confession had been beaten from him (A. 104). Rosner told him that "this was not the proper time to bring up the confession", because if

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[2] Prior to the assignment of counsel Richardson had been committed to Bellevue Hospital for psychiatric examination (A. 105) and apparently remained in Bellevue until June 20 (A. 106).

[3] Richardson also made an allegation that he told a judge he wanted to withdraw his plea, but the judge stated that since the court accepted the plea, this could not be done (A. 96).

he went to trial, the confession would be used to get him the electric chair, whereas if he pleaded guilty and saved his life, he could "later explain by a writ of habeas corpus how my confession had been beaten out of me" (A. 104).

Richardson then alleged (A. 104):

> "It was at this point that I decided to go along with the change of plea. I felt that if my own attorney told me that the confession would in all probability get me the electric chair; and also that I could attack the confession later without risking my life, then I had better go along."

The State of New York submitted no affidavit in opposition in the district court, and in the court of appeals submitted only the affidavit of Mr. Rosner executed September [*sic*] 9, 1963,[1] in support of his application to the court for compensation (N.Y. Code Crim. Proc. §308), in which Rosner stated in pertinent part (A. 106):

> "counsel had conferences with defendant and with each other relative to preparation for trial as well as relative to the advisability of obtaining and taking a compromise plea."

The Court of Appeals for the Second Circuit, in remanding the case for a hearing, held:

Since there had been no state court hearing on Richardson's allegations, he was entitled to a federal hearing unless his allegations were "vague, conclusory, or palpably incred-

[1] Rosner's affidavit is very confusing as to dates, reciting for instance, that sentence was imposed on September 25, 1963 (A. 107) whereas the minutes of sentence show that this was done on October 9, 1963 (A. 93).

ible" (A. 166) and the hearing could not be denied merely because the facts asserted by him are contradicted by the State (A. 167).

Since a "voluntary" plea of guilty waives all non-jurisdictional defects, "it is only logical that the standards for determining voluntariness must be as high as those for waiver" (A. 169).

Presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary (A. 169).

> "In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that the attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time . . . a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel'" (A. 170).

2. Foster Dash

Dash was convicted upon his plea of guilty in the former County Court for Bronx County on August 3, 1959, and sentenced to eight to fifteen years as a second felony offender.

In January of 1959, "John Doe" indictments for robbery had been returned against three persons and warrants issued for their arrest (A. 23). Dash and two other persons,

Albert Devine and Rudolph Waterman were arrested. Confessions were obtained from Waterman and from Dash. Waterman and Devine went to trial and were convicted. Their convictions were reversed (12 A.D.2d 84 [1st Dept., 1960] aff'd 9 N.Y.2d 561 [1961]) on the ground that statement taken from Waterman violated his constitutional right to the effective assistance of counsel, the Appellate Division also noting that:

> "... the circumstances under which the alleged confession was obtained may well stamp it as involuntary when fuller evidence is adduced" (12 A.D.2d at 87).

In 1963, Dash brought a writ of error *coram nobis* in state court attacking the voluntariness of his plea. The writ was denied without a hearing, and the order affirmed on appeal by the Appellate Division (21 A.D.2d 978, 1st Dept., 1964) and the New York Court of Appeals, two judges dissenting. 16 N.Y.2d 493 (1965).

Dash then applied for the federal writ, alleging that he was arrested and held incommunicado for seven and one-half hours (A. 25), beaten and questioned in relays (A. 24) and refused the right to contact his family or to be confronted with witnesses against him (A. 25). When he was taken to an assistant district attorney he asked for counsel, but was told he had already been indicted and that he could have counsel soon enough (A. 55). He was further told that if he did not cooperate, the office would "clear the books" with him and fix it so that every unsolved crime would be his (A. 25). Dash alleged he then involuntarily signed a prefabricated confession to a crime he did not commit[5] (A. 25).

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[5] The District Attorney's brief to the New York Court of Appeals in *People* v. *Waterman*, *supra*, stated that the complainant testified

On March 16, after counsel was assigned, Dash appeared for pleading and was told that the District Attorney was offering a plea to robbery, first degree. "Defense counsel advised relator that he had better interpose a plea of guilty to the indictment due to the confession signed by this relator" (A. 25). Dash wanted to go to trial because he was not guilty of any crime (A. 26). The case was postponed until April 1, and when Dash appeared in court, the trial judge "stated that if relator decided to go to trial, and then did not prevail therein, the court would then impose the maximum penalty upon him" (A. 26).

Dash alleged that his counsel's statement that he "didn't stand a chance" due to the confession,[6] coupled with the trial judge's threat that he would receive the maximum sixty year sentence if he stood trial, induced his plea.

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at trial that he was robbed by *three* men, Devine, Waterman and Fields (Br. p. 2). The only other prosecution witness, a taxi driver, stated he drove four men away from the scene of the crime (Br. p. 3). He was unable to identify them (Br. p. 3). The complainant testified that *three* men pulled away from the scene in a taxi (Br. p. 2). The only other evidence at the trial was Waterman's confession, and a ring which the complainant stated Fields had taken from him during the robbery (Br. p. 3).

[6] In his legal argument, Dash stated (A. 29):

> "The futility of relator's position is more clearly seen when this Court considers the fact, that the only choice remaining to him—beside the entry of the plea of guilty to a crime that he had not committed—was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession. For it was only in the case of *Jackson v. Denno* (32 U.S.L.W. 4620 (1964), decided by the United States Supreme Court June 22, 1964), that the Court recognized the insoluble plight of a defendant in New York, faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. Relator had no such remedy when he was faced with the situation."

The State's affidavit in opposition did not deny the allegations of the writ, but asked that relief be denied on the ground that a voluntary plea of guilty entered on advice of counsel is a waiver of all nonjurisdictional defects. The affidavit also stated that it appeared from the New York Court of Appeals opinion that the state court prosecutor filed an affidavit in the *coram nobis* proceeding stating that the trial judge never threatened Dash. This affidavit was not produced below. The State also observed that even assuming the trial court did inform Dash as to the possibilities of sentence, "such advice is not only not improper but may even be desirable." (A. 34).

The Court of Appeals for the Second Circuit, *en banc*, reversed the denial of the writ without a hearing and remanded for a hearing, holding:[1]

> A plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attacks upon a conviction (A. 114).
>
> The doctrine that an involuntary guilty plea may be collaterally attacked and the doctrine that a guilty plea waives prior defects in the proceedings against the defendant are separate and distinct (A. 116).
>
> Where a petitioner for *habeas corpus* raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain*, 372 U.S. 293 (1963) are applicable in determining whether to hold a hearing (A. 119).

[1] Since the decision in Dash's case was in large part predicated upon the decision in *U.S. ex rel. Ross* v. *McMann* which has been dismissed and vacated by this Court as moot due to Ross' death, 38 U.S.L.W. 3209, the summary of decision here is taken from that case, as well as the *Dash* opinion.

The guilty plea-waiver rule means that an allegation that petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question (A. 119). However an allegation that a confession was coerced, and that the confession induced the plea, made with particularized specifications as to how the confession rendered the plea involuntary, is sufficient for a hearing, provided that additional supporting material, such as affidavits of counsel or the like, are appended to the petition (A. 120).

The role of the attorney in advising a guilty plea should not be ignored, even where there is evidence that a confession has been coerced (A. 120). The reason for this is that counsel's advice to plead guilty despite the existence of a coerced confession may be justified once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied (A. 120); but where the confession was coerced and where the only available state trial procedure for contesting the validity of the confession was one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964), the decision of the accused to plead guilty may well be involuntary, because a defendant cannot be deemed to have waived his coerced confession claim by deliberately by passing state procedures when the state failed to afford him a constitutionally acceptable means of presenting the claim at trial (A. 122).

In this case, Dash alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found

guilty after trial (A. 124). In these circumstances, there is a question of motivation of the plea which cannot be resolved without a hearing (A. 125).

If, at the hearing, it is ascertained that the plea was substantially motivated by the claimed threat of the judge or the existence and threatened use of a coerced confession, it may be found not to have been voluntary (A. 125). But if it is found that the plea was freely made on the advice of counsel because of the weight of the state's case aside from the coerced confession, with apparent likelihood of conviction regardless of the confession, the court may find the plea voluntary, and the conviction unassailable (A. 125). Of course, if it is found that the confession was voluntary and there was no threat by the trial judge, the conviction would stand (A. 125 n. 6).

3. McKinley Williams

Williams was convicted in the former Bronx County Court on April 9, 1956, upon his plea of guilty to the crime of robbery, second degree, and sentenced to seven and one half to fifteen years imprisonment.* He was represented by court assigned counsel (A. 48). The minutes of plea and sentence were not before either of the courts below.

Williams brought six applications for the writ of error *coram nobis* in state court attacking his plea and all were denied without a hearing (A. 177).

Williams applied *pro se* for the federal writ. In his petition, he incorporated the brief filed by assigned coun

* The opinion below incorrectly states that he was a second felony offender (A. 174). He had prior misdemeanor convictions, but no felony convictions.

sel on his last *coram nobis* appeal into the body of the petition (A. 48), although it was physically attached as an exhibit. Williams alleged that he was twenty years old when arrested on January 26, 1956, and that he was held at the Bronx police station without booking, on an open charge and not informed of his rights (A. 49-50). He stated that he was handcuffed to a chair, held without food or sleep, threatened physically, and that he finally agreed "to a tale narrated to him by police" out of fear and exhaustion (Appellate Division Brief, p. 3).

Williams was not assigned a lawyer until February 10 (A. 48). He alleged that the assistance rendered him by this attorney, who was later disbarred (A. 48 n. 4), was inadequate and incompetent (A. 60).

Williams stated that when he initially appeared in court, he refused to plead guilty (A. 50) but that following a conference with the lawyer, he returned to the courtroom and entered the plea (A. 50). Williams further alleged that he was not in the jurisdiction when the crime was committed, and that his attorney, despite knowing this, advised him to plead guilty on the representation he would be pleading to a misdemeanor (Appellate Division Brief, p. 4).[9] Williams stated that he was not apprised by the court either of the consequences of the plea, or of the nature and meaning of the charge (A. 50).

[9] The D.C.I. Report, which the Attorney General annexed to his reply, shows (as Williams pointed out (A. 69)) that at least one entry on the D.C.I. showed him in New York on a day when he was incarcerated in Dayton, Ohio (A. 65).

[10] Williams stated that he had attempted to secure an affidavit from the attorney in connection with a prior state writ, but was unable to locate him (A. 50 n. 6).

Williams also alleged that there were no witnesses who placed him at the scene of the crime, and that apart from the confession there was not "one scintilla" of evidence connecting him to the commission of the crime (A. 49). He argued that he did not waive his right to challenge the coerced confession by entering his guilty plea since at trial, he could not have received "a fair determination on the issue of voluntariness nor a fair trial" because at the time of his plea, the voluntariness of the confession was an issue of fact for the jury, to be resolved along with the issue of guilt or innocence, and "relator in effect by pleading guilty did not waive any genuine and valid right, since a waiver of an unfair procedure constitutes no waiver at all" (A. 54).

The State did file an affidavit in opposition to the petition in district court in this case. None of the factual allegations were controverted, as the State contended "that invalidity of the confession, even if shown, would not avoid the conviction upon petitioner's plea of guilty" (A. 61).

The court of appeals reversed the district court and remanded for a hearing on two grounds: while a voluntary guilty plea is a waiver of all non-jurisdictional defects, a prior constitutional violation of a defendant's rights is relevant to the issue of voluntariness of the plea itself. (A. 175) and since Williams alleged that his plea was motivated by a false, coerced confession, the validity of which he was unable, for all practical purposes, to contest at trial, he is entitled to a hearing on the voluntariness of his plea (A. 176-7); and, in addition, if Williams pleaded guilty on the advice of an attorney who knew of the existence of a perfectly good alibi defense, there is a question as to whether he was adequately represented by counsel when

he entered his plea (A. 177). Similarly if he was misled by the attorney into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the plea was intelligently made. Hence Williams is entitled to a hearing to show that his plea was a mistake and was induced by inadequate representation of counsel (A. 177).

Summary of Argument

The court of appeals, in three separate cases, held that a petitioner is entitled to a *habeas corpus* hearing on the voluntariness of his plea where he alleges that his guilty plea was induced by the existence and threatened use of a coerced confession, which he could not contest at trial either because of incompetence of court-assigned counsel or because the existing trial procedure for litigating the confession claim was fundamentally unreliable and unfair and did not avert the clear danger of convicting the innocent.

In limiting its prior decision to the contrary[11] and adopting this rule, the Second Circuit brought its decisional law into harmony with the decisions of this Court (*Chambers v. Florida*, 309 U.S. 227 [1940]; *Waley v. Johnston*, 316 U.S. 101 [1942] and *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 [1956]), as well as with the decisions of a majority of the other circuit courts of appeal and a substantial number of state court decisions,[12] which have

[11] *United States ex rel. Glenn v. McMann*, 349 F.2d 1018 (2d Cir. 1965), cert. den. 383 U.S. 915 (1966).

[12] Since these cases are so numerous, they have been cited in an appendix to this brief rather than set out in a footnote.

heretofore considered the effect of a coerced confession upon the voluntariness of a guilty plea. These cases interdict the use of a coerced confession to secure a plea because such a method of ascertaining guilt is neither reliable nor acceptable to a civilized society. Moreover, all of these cases hold that the entry of the plea is not an isolated and independent event divorced from all of the events occurring prior to the plea proceeding. These cases recognize that, despite the fact the defendant is represented by counsel and has stated that the plea is voluntary, a variety of things may have occurred prior to the plea which may have rendered the defendant incapable of making a deliberate and responsible choice. Because "the ascertainment of the guilt of a prisoner [is not] more important than the means by which it [has] been achieved",[13] these decisions are not content to rest upon a conclusive presumption of regularity in all plea cases, or to assume, as the petitioners would have them do, that "the potential inadmissibility of evidence at a trial forms no part of the inquiry either initially or collaterally into the knowing and voluntary nature of a plea of guilty" (Pet. Br. 25).

The Dash and Williams cases contain a factor not present in the cases previously referred to in that the court below recognized that before *Jackson* v. *Denno*, 378 U.S. 368 (1964), the existence of an unconstitutional and inherently unreliable proceeding for litigating the voluntariness issue at trial, could play a coercive role in the defendant's decision to abstain from raising his challenge to the confession at trial, just as other factors such as in

[13] *United States ex rel. Perpiglia* v. *Rundle*, 221 F. Supp. 1003, 1012 (E.D. Pa., 1963).

competence of counsel (as was alleged in *Richardson* and *Williams*) or lack of counsel altogether, could prevent the sentient waiver of trial from being a voluntary one in the constitutional sense. However, the notion that one who is forced to elect between submitting to an unconstitutional, or even unfair procedure, or to refrain from asserting his claimed constitutional right at all does not waive his right because he does not exercise a free choice, is consistent with prior law. See *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Simmons* v. *United States*, 390 U.S. 377 (1968).

Ninety-five per cent of all criminal adjudications in this country are based upon pleas of guilty. The pleas in these cases were entered during an era when this Court was continually required to review case after case which came to trial with a confession extracted by brutality or psychological coercion. There is no reason to assume that within the perimeters of this "bigger haystack" of plea cases which petitioners posit (Pet. Br. 54), there are not defendants who were subject to the same abuses as were *Spano*[14] or *Leyra*,[15] or *Culombe*[16] or *Rogers*[17] and to conclude that because of the magnitude of the numbers, the Constitution need not be enforced for them as it has been for the few who have gone to trial.

In each of these cases the respondent has also alleged facts independent of the confession claim which would entitle him to relief under the Fourteenth Amendment if proved at a hearing. In ordering hearings upon these,

[14] *Spano* v. *New York*, 360 U.S. 315 (1959).

[15] *Leyra* v. *Denno*, 347 U.S. 556 (1954).

[16] *Culombe* v. *Connecticut*, 367 U.S. 568 (1960).

[17] *Rogers* v. *Richmond*, 365 U.S. 534 (1969).

claims as well as upon the coerced confession claims the decisions below were not as petitioners characterize them, "ill considered", "extraordinary" nor based upon "a misconception of the components of a knowingly and voluntarily entered guilty plea" (Pet. Br. 22).

POINT I

The Court Below Correctly Held That a Conviction on a Plea of Guilty Based on a Confession Extorted by Violence or Mental Coercion Is Invalid Under the Due Process Clause of the Fourteenth Amendment.

A guilty plea, in order to be constitutionally valid, must be voluntary, since the power of the court to pronounce judgment and sentence is predicated upon the plea rather than upon a jury verdict. *Kercheval* v. *United States*, 274 U.S. 220, 223-4 (1927).

There are three basic reasons why a plea must be voluntary:

First, since the Constitution guarantees all defendants a right to trial, the entry of a guilty plea constitutes a waiver of that right, as well as the right to confront one's accusers and the privilege against compulsory self-incrimination. *McCarthy* v. *United States*, 394 U.S. 459 (1969). As with all waivers, the plea must be intelligently and voluntarily made.

> "For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnston* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if

a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, *supra*, 394 U.S. at 466.

Second, the requirement of voluntariness, emerging as it does from the concept of due process, requires, at a minimum, a fair fact finding procedure designed to elicit accurately the relevant facts. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Conviction upon judicial admission of guilt satisfies this requirement unless the admission has been induced by unfair means [*Boykin v. Alabama*, 395 U.S. at 242-3], or means which might induce an innocent person to plead guilty. *Von Moltke v. Gillies*, 332 U.S. 708, 719 n. 5 (1948).

Thirdly, a compelled judicial admission of guilt conflicts with the defendant's Fifth Amendment right not to be compelled to incriminate himself. *Harrison v. United States*, 392 U.S. 219 (1968). In this respect, the requirement that a plea, like any other judicial admission of guilt, be voluntary, is based upon the same ethical considerations which prohibit the use of any coerced confession as "offensive to basic standards of justice . . . because declarations procured by torture are not premises from which a civilized forum will infer guilt . . . " [*Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944)], and also because "the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system . . . " *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).[18]

[18] Cf. *Developments in the Law: Confessions*, 79 Harv. L. Rev. 935 at 1064 (1966): "Although the present constitutional standard

When a guilty plea is based upon a confession extorted by violence or mental coercion it offends against each of these principles.

If the motivation for the plea is a coerced confession, then the decision to forego trial is not the rational product of a free will which, unbeclouded by subverting factors, freely and intelligently refused to put life or liberty to the test of a trial. (Cf. *Von Moltke* v. *Gillies*, *supra*, 332 U.S. 708, 729 [Mr. Justice Frankfurter, concurring].).

If the confession was coerced, and the plea is based upon that confession, then just as where a trial verdict is based upon such confession, there is no assurance that the fact finding procedure leading to the judgment is reliable.

The right not to be compelled to incriminate oneself is, in itself, grounded upon traditional notions of unreliability of this form of fact-finding, as well as the concept that in an accusatorial system, the state and not the individual must supply the evidence of guilt. Since a plea, like a jury verdict, is conclusive, while an extrajudicial confession is not, it would set reason on its ear to prohibit the lesser but not the greater.

The petitioners have argued that a *voluntary* plea of guilty is an independent basis of conviction not dependent on evidence. We have no quarrel with this statement.

denies that a confession's truthfulness is relevant to its voluntariness, it does not reject the common law understanding that many confessions given 'involuntarily' may be inherently untruthworthy." It could also be said this same inherent distrust of the truthfulness of the involuntary confession is part and parcel of the constitutional standard interdicting the involuntary guilty plea.

However, their entire argument (Pet. Br. 31-35) is misplaced, since in making the "constitutionally required determination"[20] that a plea is voluntary, this Court has never taken the position urged by petitioner and relied upon by Judge Friendly in his dissenting opinion in *Ross*, and *Dash*,[21] that a coerced confession "forms no part of the inquiry, either initially or collaterally into the knowing and voluntary nature of a plea of guilty" (Br. 25).

Judge Friendly stated:

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted on a guilty plea . . . is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights" (A. 155).

In being so premised his dissent falls into the same basic misconception of the case law as that made by the petitioners.

In *Chambers et al. v. Florida*, *supra*, 309 U.S. 227, the convictions of four defendants were reversed by the Court on the ground that under the due process clause, they had the right to have their guilt or innocence determined without reliance upon coerced confessions. While one defendant went to trial, three were convicted upon their pleas of guilty[22] (309 U.S. at 227, n. 2).

In *Pennsylvania ex rel. Herman v. Claudy*, *supra*, 350 U.S. at 118, when the Court stated:

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[20] *McCarthy v. United States*, *supra*, 394 U.S. at 459.

[21] And adopted by the New York Court of Appeals in *People v. Nicholson*, 41 N.Y.2d 1067 (1962) and reaffirmed in *People v. Dash*, 16 N.Y.2d 493 (1965), see A. 146.

[22] Each defendant had counsel appointed to represent him on May 22, 1933 (Record, *Chambers v. Florida*, Respondent's brief

"Our prior decisions have established that (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause . . ."

It cited *Chambers* as authority for that proposition. Hence it cannot be said, as Judge Friendly stated (A. 136), that "none of the six decisions cited by the Court in *Herman v. Claudy*[1] in support of that statement related to guilty pleas." And in *Waley v. Johnston*, *supra*, 316 U.S. 101, 104 the Court in holding that convictions upon a plea of guilty allegedly coerced by threats of law enforcement officials violated due process, reasoned by analogy that a conviction predicated upon such a plea is no more consistent with due process than a conviction supported by a coerced confession, citing *Chambers*. In both instances, since the plea is so coerced as to deprive it of validity to support the conviction, it is "likewise deprived . . . of validity as a waiver of his right to assail the conviction." 316 U.S. at 104.

The Second Circuit in its *Ellis* decision, *supra* (349 F.2d 1018), the district courts within the second circuit (A. 124), and the New York Court of Appeals had held that "a coerced confession or other violation of the defendant's rights is *never* relevant to the issue of voluntariness" of the plea (A. 312). A majority of the judges in the decision below (as have a majority of the other circuits)[2], relied upon the Court's statements in *Herman*

p. 2) and pleaded on May 24, 1933 (Record *Chambers v. Florida*, Petitioner's brief p. 20). Williams and Woodward pleaded guilty on May 24 and Davis and Chambers pleaded not guilty. Davis later withdrew the not guilty plea and pleaded guilty. (309 U.S. at 235).

[1] See p. 21 n. 20, *supra*.

[2] See Appendix to this brief.

v. *Chaudoin*, *supra*, and *Henry v. Johnston*, *supra*, to hold that a coerced confession is relevant to the voluntariness of a plea. Based upon its interpretation of these cases, the court below stated the following rule:

> "... an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea". (A. 119).

The opinion below does not "reach behind a guilty plea to test an evidentiary defense which could have been tested at trial". (Pet. Br. 22). It simply recognizes, as have virtually all courts considering the issue, that the guilty plea cannot be used, *ipso facto*, to insulate the State from its own illegal acts prior to the plea which brought about that plea. See concurring opinion below of Kaufman, J. (A. 130). Since petitioners concede that the claim that a prosecutor's threat occurring before the plea and coercing the defendant into pleading is open to judicial scrutiny (Pet. Br. 26), there is no logic in withholding judicial scrutiny, as a matter of law, in the case where the plea was coerced by the threatened use of a coerced confession at trial.

The petitioners construe the following [illegible] to sustain their argument in this respect: the threatened use of *legal* evidence hardly amounts to a denial of due process. Therefore, *a fortiori*, the fact that some of this evidence is now alleged to have been obtained *illegally* cannot

This simply does not follow. To the extent that an illegally obtained confession has been used to secure a conviction, the conviction violates due process. If the evidence is used to obtain the conviction by its introduction into evidence to secure a jury verdict, the verdict and hence the conviction is tainted with the underlying illegality. If the evidence is used to obtain the conviction by using it to secure a plea, the plea and hence the conviction is equally tainted. See *Chambers v. Florida, supra.*

Whether or not the illegally obtained confession was used to secure the plea, or whether the respondents pleaded for other reasons as petitioners suggest (Pet. Br. 27), must be decided at a hearing where a defendant alleges the former and the State maintains the motivation for the plea was the latter. The petitioners concede this when they recognize and do not dispute as wrongly decided, the cases which "make it clear that a *habeas corpus* petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief" (Pet. Br. 28). Our position (see Point II), and the court below so held, is that such a nexus between the coerced confession and the guilty plea was alleged to have existed in each of these three cases, and that the petitioners' attempts at distinguishing them from the cases where they concede that a hearing was properly granted are not persuasive.

The petitioners also state that the "role of counsel in advising a guilty plea should not be ignored" (Pet. Br. 35). Again we have no quarrel with this statement and neither did the court below (A. 120). However, we do take issue with petitioners' position that the fact each respondent was represented by counsel establishes, as a matter of law, that counsel was adequate (in the case of Richardson and

Williams) or that representation by counsel, when adequate, could insure that the coercive elements which produced the confession did not also produce the plea (see Point II).

POINT II

In Each Case Here for Review, the Respondent Has Made Sufficient Allegations, Which if Proved at a Hearing, Would Establish That His Guilty Plea Was "Based on" a Coerced Confession. Hence the Court Below Did Not Err in Granting a Hearing Upon This Claim in Each Case.

Having decided that a guilty plea is not insulated from judicial scrutiny when a *habeas* petitioner alleges the plea was predicated upon a coerced confession, the Second Circuit then went on to consider the subsidiary questions of (1) when does the law deem a plea to be *based on* a coerced confession and (2) what allegations must a petitioner in *habeas corpus* make in such a case in order to qualify for a hearing under *Townsend* v. *Sain, supra.*

A majority of the judges in the Second Circuit rejected the position now taken by the petitioner (Pet. Br. 28-31) and espoused by Judge Friendly in his dissent in *Ross* and *Dash* (A. 156-57) that if a conviction can ever be deemed "based on" a coerced confession it can only be so in the exceptional cases where the defendant was not represented by counsel at the plea and was coerced or tricked by the State "in the ordinary use of language" (A. 155).

In each of the three cases here for review, the Second Circuit held that "representation by counsel and proper

questioning by the judge at the plea taking [cannot be relied upon] to establish voluntariness . . . where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone" (A. 121, opinion in *Ross-Dash;* A. 169, opinion in *Richardson*).

Once again, this is no innovation in the law. In *Machibroda* v. *United States,* 368 U.S. 487 (1962), the Court refused to assume the plea was voluntary in the face of allegations to the contrary, although the defendant was represented by counsel and the trial court had conducted a proper inquiry before accepting the plea.

See also *Pennsylvania ex rel. Herman* v. *Claudy, supra,* 350 U.S. at 121; *Walker* v. *Johnston,* 312 U.S. 286 (1941); *United States* v. *Tateo,* 214 F. Supp. 560, 564 n. 8 (S.D.N.Y. 1963).

Having decided that the plea proceedings themselves do not, *ipso facto,* foreclose further inquiry when the defendant is represented by counsel and makes an admission of guilt and voluntariness, the court below considered in each case whether the allegations of the petition, if proved at a hearing, would establish that a nexus existed between the allegedly coerced confession[24] and the plea,

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[24] The court below made it clear that the conviction would stand if the confession were ruled voluntary (A. 122 n. 4, A. 125 n. 6, A. 178). Therefore the suggestion in the *amicus* brief (p. 10) submitted by the District Attorney of New York County that the writ could be granted if the defendant merely subjectively believed the confession was coerced, is absurd. The question is whether the state violated the defendant's constitutional rights, not the defendant's subjective state of mind. See *Townes* v. *Peyton,* 404 F.2d 456 (4th Cir., 1968) cert. den. 395 U.S. 924 (1968), where the court held that the defendant's subjective fear of an unproven pattern of official behavior is insufficient to void a plea, even though if the pattern were proved, the plea would be invalid.

which would prevent the plea from being deemed voluntary.

1. Richardson

Richardson alleged that he was beaten into confessing a crime he did not commit. According to his petition, court-assigned counsel conferred with him only ten minutes and told him at that interview counsel would "get paid the same amount of money for representing me regardless of the outcome" (A. 103). On the eve of the trial, counsel advised him to plead guilty to murder, second degree, and when Richardson stated he did not want to plead to something he had not done and to which he confessed only because he was afraid and in pain, counsel told him "this was not the proper time to bring up the confessions" (A. 103-4). Counsel told him to plead guilty, thereby saving his life, and then he could later explain on a writ how the confession had been beaten out of him (A. 105).

The existence of the pre-*Jackson* v. *Denno* procedure for contesting the confession at trial played no role in the decision to plead,[25] and the court below, quite properly, did not rely upon this as an ingredient of its decision. It looked instead to the allegation concerning adequacy of counsel's representation generally and to the specific allegation of counsel's incorrect advice *vis a vis* the remedy for challenging the confession to supply the nexus between the coerced confession and the voluntariness or involuntariness of the plea.

During the entire period between the interrogation at the station house and the plea, Richardson's attorney pro-

[25] And the petitioner so concedes (Pet. Br. 46).

vided the only buffer between the fact of the coerced confession and conviction for a capital crime. Without counsel's assistance, the confession could not be challenged, and without challenge to the confession, conviction was inevitable. There were no eye witnesses to the crime. The circumstantial evidence plus the confession meant death.

Richardson's case is not unlike two others, where the defendant, after making a coerced confession, was rendered powerless to prevent its being used against him because his attorney gave him only perfunctory assistance and where the writ was granted. *Jones* v. *Cunningham,* 297 F.2d 851 (4th Cir., 1962); *United States ex rel. Heath* v. *Rundle,* 298 F. Supp. 1207 (E.D. Pa., 1969). And in *Carpenter* v. *Wainwright,* 372 F.2d 940 (5th Cir., 1967), *Smith* v. *Wainwright,* 373 F.2d 506 (5th Cir., 1967) and *Bell* v. *Alabama,* 367 F.2d 243 (5th Cir., 1966), hearings were ordered on similar allegations to those made by Richardson.

These cases recognize that without the effective assistance of counsel, a defendant, faced with the alternatives of trial or plea, does not have a fair choice between viable alternatives, since the option of going to trial with ineffective assistance of counsel is not a legitimate one. Cf. *Wilson* v. *Rose,* 366 F.2d 611 (9th Cir., 1966); *United States* v. *Colson,* 230 F. Supp. 953 at 961 (S.D.N.Y., 1964). Furthermore, they also recognize that without the effective assistance of counsel, just as with no counsel at all, the coercion producing the confession continues unbroken until the entry of the plea, since no neutral agent is interposed between the initial coercion and the plea itself. Cf. *Gladden* v. *Holland,* 366 F.2d 580 at 583 (9th Cir., 1966). In this respect these decisions are akin to the cases involving successive confessions, where the second "valid" confession

cannot be separated from an earlier involuntary one. No matter how respectable the second confession may appear on the surface it is tainted if there is no break in the stream of events sufficient to insulate that confession from the effect of all that went before. See *Clewis* v. *Texas*, 386 U.S. 707, 710 (1967).

The allegation that, in addition to giving him perfunctory representation, the attorney misled him as to when the confession issue could be raised, presents a second basis for holding that the plea was not voluntary and hence not a waiver of his coerced confession claim: if Richardson gave up his right to trial upon the assumption that by doing so he did not waive the right to contest the voluntariness of his confession at a later date, then he did so without knowledge and understanding of the "nature and consequences" of the guilty plea he entered.[26] A plea given without knowledge of its nature and consequences is not a voluntary plea (*McCarthy* v. *United States, supra*, 394 U.S. 459) because for any waiver to be valid, it must be made with awareness of the rights that it abandons.[27]

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[26] *People* v. *Nicholson, supra*, 11 N.Y.2d 1067, holding that confession claims could not be raised after a plea of guilty, was decided the year before Richardson's plea.

[27] This is not, as the petitioners seek to make it appear (Pet. Br. 33-35) a claim that the guilty-pleading defendant must be aware of the *result* of the motion to exclude the confession before he can enter a knowing and intelligent plea, but merely that he must be informed by someone, either the court or counsel, that if he pleads he loses his right to contest the confession forever. *Cantrell* v. *United States*, 413 F.2d 629 (8th Cir., 1969), relied upon by petitioners for their overgenerous statement is inapposite because in that case, although the defendant alleged he was unaware that his plea waived his Fourth Amendment claim, the district court specifically found that "all of the petitioners rights were

There are many situations in which a plea has been vacated as involuntary because the defendant did not understand the nature or consequences of the plea. Generally speaking, these are cases where the defendant was unaware he was pleading to a felony [see *Anders* v. *Turner*, 379 F.2d 46 (4th Cir., 1967)] or was unaware of the penalty involved [see *Pilkington* v. *United States*, 315 F.2d 204 (4th Cir., 1963)]. In these cases, as in the case at bar, since the defendants lacked accurate knowledge of the nature or material consequences of the plea, the pleas were ruled involuntary.

Richardson made specific allegations as to why his plea was "based on" the allegedly coerced confession.[28] Without the effective assistance of counsel, he could not have challenged the confession at trial and he had no choice but to plead guilty. He was on trial for a capital crime. Any other course might well have "seemed an act of defiance, likely to offend the Judge as an arbitrary impediment to a swift sentence where guilt had already been

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fully explained to him not only by the court but by the District Attorney and he fully understood them." 413 F.2d at 631.

People v. *Habel*, 25 A.D.2d 182 (1st Dept., 1966) and 18 N.Y.2d 148 (1966) is more analogous to the case at bar than the *Cantrell* decision. There the defendant entered his plea upon the misconception, uncorrected by either the court or the prosecutor, that despite the plea he could raise the denial of a motion to suppress evidence based on eavesdropping orders on appeal. Both the New York Appellate Division and Court of Appeals ruled that he could not and dismissed his appeal, but both courts accepted the District Attorney's concession that, because of the misconception of the nature and consequences of the plea in this respect, the plea could be withdrawn if the defendant was so disposed.

[28] As we show (Point III, *infra*) these allegations were not patently absurd or contradicted by the record as a whole.

acknowledged." *United States ex rel. Perpiglia* v. *Rundle*, *supra*, 221 F. Supp. at 1011-12. The court below did not err in holding that "a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel'" (A. 170).

2. Dash

Dash alleged that he was arrested after an indictment had been returned against him, and that he was held incommunicado for seven and one-half hours, refused the right to contact family, questioned in relays, and beaten. He was told that if he did not confess, the district attorney's office would "clear the books" with him, and further told that he could not have counsel present at that time. He then signed a "prefabricated" confession to a crime he did not commit.

Counsel was assigned and soon after conveyed an offer from the District Attorney's office for a plea to robbery first degree. In urging him to take the plea, counsel told him that he didn't stand a chance at trial because of the confession. Dash remained unconvinced until his next court appearance when the judge told him that if he went to trial and lost, the court would impose the maximum sixty year penalty. Due to his attorney's statement that he would lose at trial because of the confession and the court's threat to interpose the maximum sentence upon the conviction, which now seemed inevitable because of the confession, Dash withdrew his previous plea to plead guilty.

Dash made no claim of incompetence of counsel, and the Second Circuit was unwilling to hold, as had other courts,[29] that the existence of a coerced confession, in itself, was

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[29] In *Zachery* v. *Hale*, 286 F. Supp. 237, 240 (M.D. Ala., 1968), the writ was granted after a hearing wherein it was proved that the confession was coerced, the court stating:

> "The involuntariness of the confession is significant, even though Zachery upon advice of counsel . . . entered a plea of guilty, since one of Zachery's court-appointed counsel, the Honorable Hoyt W. Hill, testified before this court that the obtaining of the confession from Zachery was a factor that entered into his recommending to Zachery that he plead guilty. Therefore, we have one of Zachery's court-appointed counsel, as he was forced to do under the circumstances, give some consideration and weight to an illegal confession in recommending to Zachery that he enter a plea of guilty to the first degree murder charge. Thus it is readily apparent that the plea of guilty . . . was not voluntary; to the contrary, it was in part forced by reason of the illegal confession that had been extracted from him by the authorities on May 19, 1961."

In *United States ex rel. Cuevas* v. *Rundle*, 258 F. Supp. 647, 656-7 (E.D. Pa., 1966), in granting the writ after a hearing in which the confession was found coerced, the court held:

> "at the hearing held before me, counsel who represented the relator at his trial testified that the existence of the statement was the deciding factor in his advice to the relator to plead guilty to murder generally. It is obvious that the existence of the statement led to the relator's guilty plea."

See also *Smiley* v. *Wilson*, 378 F.2d 144, 148 (9th Cir., 1967) where in remanding for a hearing the court stated:

> "In our opinion, neither an assumption nor a finding upon evidence that a defendant had competent counsel, warrants rejection, without a hearing, of an issue based upon an adequate factual allegation that a plea of guilty was primarily motivated by a confession obtained by physical or mental coercion. The adequacy of counsel and the voluntariness of a plea are not sufficiently interrelated so that the proof of the first establishes, as a matter of law, proof of the second."

Contrast these decisions with the statement in petitioners' brief (p. 23): "The role of evidence, as such, has not been, nor should it be grounds for challenging the validity of a plea merely because it was taken into account in . . . [the] decision to plead."

sufficient to render the plea involuntary provided that the existence of the coerced confession played a role in competent counsel's advice to plead and the defendant's decision to do so. Instead, the court below held that when the defendant is represented by competent counsel and chooses to plead guilty rather than go to trial with an involuntary confession, he has, in most instances, deliberately by-passed the only available and acceptable state procedure for raising his constitutional claim, and since the state court refuses to give him collateral relief in such case, principles of comity require that he should not be allowed to present these claims in a federal court (A. 121-122).

The Second Circuit then distinguished this general situation from the situation confronting Dash and his attorney in 1959 when the decision to plead was made, by pointing out that:

> "... the only available state procedure by which [Dash] could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno* ..." (A. 122).

Thus Dash, though represented by competent counsel:

> "... cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of preventing that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which, he was unable, for all practical purposes, to contest" (A. 125).

The nexus between the coerced confession and the plea in *Richardson* was counsel's unwillingness to do anything meaningful to prevent the confession from being used to convict Richardson at trial and his erroneous advice that the confession claim could be raised collaterally despite the plea; the nexus in this case was counsel's inability to do anything meaningful to prevent the confession from being used to convict Dash at trial.[30]

In order to appreciate the impasse counsel faced in 1959, an appraisal of the *Stein*[31] procedure for litigating the confession issue at trial, as well as the coercive effect this procedure had upon the decision to plead, must be considered.

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[30] In this respect the decision below is comparable in analysis to *United States ex rel. Perpiglia* v. *Rundle, supra,* 221 F. Supp. 1003 and *United States ex rel. Collins* v. *Maroney,* 287 F. Supp. 420 (E.D. Pa., 1968) where relief was granted after a hearing.

In *Perpiglia,* the court held that while the defendant was competently represented by counsel, counsel was powerless to protect his rights because he was brought into the case only after "the police no longer feared a lawyer's presence" and that a plea of not guilty, "might well have seemed an act of defiance to the police, likely to offend the Judge as an arbitrary impediment to swift sentence where guilt had already been acknowledged." 221 F. Supp. at 1011-12. Contrary to the petitioner's representation that Perpiglia was not represented by counsel on the day of plea (Pet. Br. 30), the transcript of state court proceedings showed that the attorney was present that day (221 F. Supp. at 1007).

In *Collins,* the court found that competent counsel, through no fault of his or the defendant's did not know the facts surrounding the confession. In such a situation, counsel was unable to challenge the confession at trial, and because of counsel's ignorance of the facts and the defendant's ignorance of their legal significance, the failure to challenge the confession was not an intentional relinquishment or abandonment of a known right of privilege. 287 F. Supp. at 424-5.

[31] *Stein* v. *New York,* 346 U.S. 156 (1953).

The New York practice under the *Stein* rule was set out in the *Jackson* v. *Denno* opinion, 378 U.S. at 377-8. The confession was offered into evidence by the prosecutor at the trial itself, and the trial judge could exclude it at that stage, and not before, if in *no* circumstances it could be deemed voluntary. The jury was *not* excluded when the judge heard evidence on this issue. If there was a fair question of voluntariness *or* if the facts were in dispute, the judge had to allow the confession into evidence and leave both the question of its voluntariness and ultimate truthfulness to the jury, to be resolved together with the ultimate question of guilt or innocence.

Dash could get no reliable determination on the issue of voluntariness itself[32] because:

[32] The petitioners overlook the *Jackson* holding on this aspect (Pet. Br. 40). They also misconceive the reason for the *Jackson* holding that a reliable hearing on the issue of voluntariness of the confession, rather than a complete new trial in all *Stein* cases, was sufficient relief (Br. 40-41).

The limited remedy given by *Jackson* of granting hearings which would insure the reliability of the adjudication of voluntariness is all that is necessary to insure the reliability of the adjudication of guilt. If a confession, after a fair fact-finding process, were found coerced, then a new trial had to be ordered since the jury might have relied upon the illegal confession in determining guilt since there is no harmless error rule for involuntary confessions. *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 621. But if the confession were found voluntary, then the jury could properly have relied upon it in bringing their verdict, and the verdict was not contaminated.

This is the same relief, with one exception, that the Second Circuit envisioned in the guilty plea case. If the confession was not coerced, then it did not infect the plea and, unless relief was warranted on grounds independent of the confession claim, the plea would stand. If the confession was coerced, then the inquiry was directed to whether it infected the plea *in fact*. If for instance, there was other independent evidence of guilt, then the plea would stand. In this last respect, the defendant who was coerced into confessing and then pleaded has a harder burden of proof than

"The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession" (378 U.S. at 381).

Even assuming the jury could overcome these obstacles and would conclude that the confession was involuntary,

"The jury . . . may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession . . ." (378 U.S. at 382)

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"It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict, or that its findings of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined" (378 U.S. at 389).

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the defendant who went to trial—the latter need only establish that the coerced confession went before the jury, not that it actually influenced the verdict; whereas under the Second Circuit decision the guilty pleading defendant must prove that the confession was the primary motivating factor in his decision to plead.

The inherent danger of this procedure was recognized by this Court in *Linkletter* v. *Walker*, 381 U.S. 618, 639 n. 20 (1964), *Johnson* v. *New Jersey*, 384 U.S. 719, 727-8 (1966) and *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966), where the Court stated that retroactive application of *Jackson* v. *Denno*, *supra*, was necessary in order to protect

> "'the very integrity of the fact-finding process' and [avert] 'the clear danger of convicting the innocent.'" *Johnson* v. *New Jersey*, 384 U.S. at 727-8.[33]

The situation confronting Dash and which he claims underlay his attorney's advice to him and induced his plea, was this: The jury's appraisal of his credibility on the

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[33] One commentary has stated that the *Townsend* v. *Sain*, *supra*, directions to grant hearings in state cases where "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" seemed "particularly directed at the *Stein* rule, an excellent example of a 'fact finding procedure . . . not adequate for reaching reasonably correct results.'" Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle* 39 N.Y.U. L. Rev. 78 at 114-15 (1964).

The fact that even under the *Stein* procedure, the New York appellate and the federal courts were able to find that confessions should have been excluded in some cases (Pet. Br. 43-4) does not establish that this Court committed grievous error in holding the *Stein* procedure so inherently unreliable that the confession issue in all cases tried prior to *Stein* had to be relitigated. To lift a phrase from Dr. Johnson (*Familiar Quotations* by John Bartlett, 14th Ed., p. 430-b), despite the *Stein* procedure, the findings in these cases that the confession was involuntary is "like a dog's walking on his hind legs. It is not done well; but you are surprised it is done at all".

Moreover, Dash and Williams were convicted at a time when the access of the indigent to the appellate process was severely limited by financial barriers that were interposed between perfecting an appeal and the ability of the indigent to pay for printing costs or to retain appellate counsel (see p. 43 *infra*). To the indigent the trial forum itself was the only forum he could be sure of having access to.

voluntariness issue would be colored by the evidence introduced to prove his guilt; even if the jury found the confession involuntary, there was a real danger that it would influence their verdict; even if the judge ruled the confession involuntary as a matter of law, the jury, having heard the *voir dire*, would know that he confessed and would know that he had a previous conviction for a felony.

That danger was more than "a construct of the fertile brains of defense lawyers without counterpart in reality" (dissenting opinion by Friendly, J., A. 160) in this case. The realities here were these: the evidence at the trial of Dash's co-defendants (see p. 8, n. 5, *supra*) showed that the complainant testified he was robbed by three men, Devine, Waterman and Fields. The taxi driver who took men from the scene of the crime testified that there were four men who engaged his cab. He could not identify them. Fields did not testify for the State.[34] Waterman's confession implicated Dash, but it could not be used as evidence against him.[35] Without Dash's own confession, the case was

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[34] Contrary to Judge Lumbard's dissenting opinion (A. 147), it is unclear whether Fields had implicated anyone, since, although Fields was arrested the day of the crime, "John Doe" indictments were returned against the other three men after Fields' arrest because their identities were then unknown to the Grand Jury (District Attorney Brief, *People* v. *Waterman, supra*, p. 4).

[35] The *amicus* brief states that a claimed violation of *Bruton* v. *United States*, 391 U.S. 123 (1968) would automatically entitle the defendant to a hearing on the voluntariness of his plea if these decisions are affirmed. This is not as clear as the *amicus* would make it. Before the decision in *Bruton* there were a number of steps defense counsel could take to insure that the co-defendant's confession would not be introduced at trial. He could move for a severance and he could move to have the co-defendant's confession redacted if the severance motion were denied. This latter was mandatory in New York. See *People* v. *Vitigliano*, 15 N.Y. 2d 360 (1965). It would appear to us that unless these preliminary attempts to prevent use of the co-defendant's confession were made,

exceedingly close. But since Dash confessed, even involuntarily, his confession would have gone to the jury with the rest of the evidence under the *Stein* procedure, either because there would have been disputed issues of fact as to what went on in the station house, or because it was for the jury to determine whether the absence of counsel after indictment rendered Dash's confession involuntary, just as they had to determine whether Waterman's confession was involuntary on this ground.

As this Court recognized in *Jackson* v. *Denno* (378 U.S. at 381-2), the jury might believe the confession because of the corroborating though inconclusive evidence of guilt and in a case like this where the evidence is legally insufficient without the confession, once having accepted the confession as true, might have found it difficult to understand policy forbidding reliance upon a coerced, but true confession.

What kind of choice did the State give Dash, himself in 1959, or an attorney competently representing Dash's best interests, when he was charged with a felony carrying a maximum sentence of sixty years? Assuming Dash's allegations are proved, the confession was coerced. After illegally obtaining his confession, the state gave him the option of going to trial before a jury which it did not insulate from hearing irrelevant, but highly prejudicial evidence on the constitutional issue of coercion, and if he

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that the *Bruton* decision could not be invoked in support of an allegation that the plea was coerced because the defendant had no way of preventing the *Bruton* violation from occurring. Of course, if counsel *refused* to do anything, in a situation where this rose to the level of a claim of incompetent representation, then the existence of the procedures for curing the potential defect might not prevent a defendant from raising this claim.

succeeded in convincing the jury that the confession was coerced, they might use the coerced confession to convict him anyway.

The Court has recognized that "voluntary" is not simply the result of having a sentient choice, and that "conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." *Haley* v. *Ohio,* 332 U.S. 596, 606 (1948).

In *Fay* v. *Noia, supra,* 372 U.S. 391, the Court held that a *habeas* applicant had not waived his right to challenge a coerced confession simply because he failed to raise that claim by an available state remedy.[36] There was no waiver in Noia's case because, although Noia had the choice to appeal or to stand pat despite the unlawful confession just as Dash had the choice to go to trial or to plead despite the unlawful confession, his choice was not a choice between fair options. On the one hand he could "sit content with life imprisonment"; on the other, he could "travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." 372 U.S. at 440. Many men do not have the heart to seek vindication of their constitutional rights no matter what the cost, and Noia's decision, like Dash's, was involuntary because the alternatives left him without the ability to exercise a free choice.

[36] Noia, like Dash, had brought a state *coram nobis* proceeding on the ground that his confession was coerced, and the New York Court of Appeals in his case, as in Dash's case, held that his failure to utilize an available state remedy "does not entitle him later to utilize the . . . writ of error *coram nobis* . . . And this is so even though the asserted error or irregularity relates to a violation of constitutional right." *People* v. *Noia,* affirmed sub nom. *People* v. *Caminito,* 3 N.Y.2d 596, 601 (1958).

Moreover, Noia got relief even though he was not forced to elect between submitting to an unconstitutional procedure or to refrain from asserting his claimed constitutional right at all—the imposition of the death penalty upon retrial was a constitutionally permissible price the State could extract if the appeal were successful. 372 U.S. at 472 (dissenting opinion of Harlan, J.).

In this case, Dash's choice was the election of submitting his coerced confession claim to an unconstitutional trial procedure or foregoing his claim altogether. His dilemma was more grisly than Noia's, because the authority which, on his allegation, wrongfully extracted his confession, then denied him any constitutionally acceptable means for litigating their violation of his rights.[37]

Judge Kaufman recognized this with great clarity when he noted:

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[37] The Second Circuit has not been the only circuit to recognize the inherently coercive effect of the pre-Jackson procedure on the defendant's, and the defense attorney's, decision not to raise a voluntariness issue at trial. In *Moreno* v. *Beto*, 415 F.2d 154 (5th Cir., 1969), the court held that defense counsel's failure to raise a confession claim at trial because of his unwillingness to expose his client to the then existing Texas procedure for litigating the voluntariness issue before the jury was not a waiver. Counsel's flat answer at trial that he did not wish to inquire into the voluntariness of the confession but was limiting his inquiry to another theory, "does not preclude applicant from asserting his right to a constitutional mode of determining voluntariness, since the choice of trial strategy was dictated by an unconstitutional procedure." 415 F.2d at 157. The court went on to state that while there is no obligation for a court to inquire *sua sponte* into voluntariness where the issue is not raised, "the issue before us, however, . . . [is the] inability of defense counsel to have voluntariness determined under a procedure meeting constitutional standards and the effect of his decision not to subject his client to an unconstitutional state procedure," 415 F.2d at 158.

"The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the State can then be transformed into a disassociated neutral observer where the defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the State's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction" (A. 130).

Fay v. *Noia, supra,* is not the only case in which this Court has recognized that a Hobson's choice is no choice at all. In *Simmons* v. *United States, supra,* 390 U.S. 377, this Court held that a defendant in a criminal case cannot be compelled to elect between giving up a valid Fourth Amendment claim or waiving his Fifth Amendment privilege against self-incrimination. It was held "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394.

In 1959, neither Dash nor his lawyer had reason to suspect that if he went to trial and was convicted, he could later challenge the confession in a constitutionally acceptable procedure because of the decision in *Jackson* v. *Denno, supra.* See *Moreno* v. *Beto, supra.* It would be intolerable in this case if Dash had to surrender his right to have the voluntariness of his confession determined at all, because he refused to invoke an unconstitutional procedure to assert the right in 1959. See also *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and *Harrison* v. *United States, supra,* 392 U.S. 219, 224-6.

The petitioners have argued that "the benefits and safeguards in the prior New York trial and appellate procedure make it unreasonable to assume that defendants were deterred from going to trial" because of *Stein*. The Second Circuit refused to make an "assumption" on this one way or the other. It merely held that a defendant was entitled to offer proof of a hearing that was the reason for the plea in his case.[38]

Moreover, the petitioners' assumption that, as a matter of law, because of the benefits and safeguards of the *Stein* procedure *plus* the prior New York appellate procedure, no plea could ever be motivated by a coerced confession and the inability to receive a reliable trial determination of voluntariness, is disingenuous.

First of all, this Court in *Jackson* v. *Denno, supra,* has laid to rest all argument about the benefits and safeguards of the *Stein* procedure. Moreover, as we have noted above (*p. 37 n. 33*) for the indigent the hope of going to trial despite *Stein* in order to prevail on appeal on the coerced confession claim was not a real one. Until 1960, an indigent defendant had no absolute right to appeal *in forma pauperis* to the Appellate Division. Until that year, in order to obtain *forma pauperis,* he had to establish that there was merit to the appeal. *People* v. *Borum,* 8 N.Y.2d 177 (1960). He did not have the assistance of counsel to make the necessary showing of merit, as counsel's obligations to him terminated at sentence. See *People* v. *Kling,* 19 A.D.2d 750 (2nd Dept., 1963), aff'd 14 N.Y.2d 571 (1964). Moreover, if he succeeded in making the necessary showing of merit in

[38] "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing" (A. 125). See also concurring opinion of Kaufman, J. A. 133-4.

order to obtain *in forma pauperis* relief, he could have the original record or the assistance of counsel on the appeal, not both. See *People* v. *Pitts*, 6 N.Y.2d 288 (1959); *People* v. *Kalan*, 2 N.Y.2d 278 (1957); *People* v. *Breslin*, 4 N.Y.2d 73 (1958), overruled by *People* v. *Hughes*, 15 N.Y.2d 172 (1965). Until 1969, this all presupposed that the indigent defendant knew of his right to appeal and filed the notice of appeal within thirty days of the date of sentence, for neither the sentencing court nor his attorney had any obligation to advise him of these things,[39] and if he failed to file despite his ignorance of his rights, until 1969, he could not use the writ of error *coram nobis* to have his appeal filed out of time. See *People* v. *Kling*, *supra*, and *People* v. *Weeks*, 23 A.D.2d 684 (2nd Dept., 1965), aff'd 16 N.Y.2d 896 (1965), cert. den. 384 U.S. 955 (1966), overruled by *People* v. *Montgomery*, 24 N.Y.2d 130 (1969), and *People* v. *Calloway*, 24 N.Y.2d 127 (1969).

In 1959, when Dash was convicted and in 1956, when Williams was convicted, the safeguards of the New York appellate procedure were munificent in theory, but ephemeral, as a practical matter, for the indigent defendant. His one real possibility for successfully challenging the confession was his trial and the only procedure available to him at trial was one which impaired the integrity of the fact finding process itself, and did not avert the clear danger of convicting the innocent. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 727-8.

The petitioners seek to divert this Court from the real issue at bar—i.e., the coercive effect of the *Stein* procedure

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[39] This was changed by court rule. 22 New York Codes, Rules and Regulations Section 606.5; 671.3; 671.5; 821.2; 821.3; 1022.13 (1968).

upon the decision to plead guilty in cases where an allegedly coerced confession had been obtained. They couch this brief in terms of the retroactivity of *Jackson* v. *Denno, supra,* and thereby place undue weight upon a concept which does not have true application in these cases.

The effect of the *Stein* procedure upon the decision to forego asserting a valid coerced confession claim at trial is only at issue in two of the three cases here for review—Dash and Williams, for it becomes relevant only where a defendant alleging that his plea is "based on" a coerced confession, also alleges that his counsel was competent, for in such cases, it supplies the nexus between the confession and the plea.

Neither the petitioners nor their *amicus* acknowledge that Richardson and to an extent Williams do not present the *Jackson* question at all. They also misconstrue and magnify the importance of the *Jackson* v. *Denno,* "retroactivity" issue in the *Dash* decision itself.

Petitioners state that the court below presumed "the invalidity of all pleas entered before June 22, 1964, where it is alleged that [an allegedly coerced] confession was obtained" (Pet. Br. 40). This characterization is inaccurate.

The Second Circuit merely viewed the *Stein* procedure as a fact of life facing any defendant who had to make the decision to plead or to go to trial before 1964. He, and his attorney, had to take the *Stein* procedure into account in determining whether or not to stand trial and seek vindication of the right not to be coerced into confessing, or to plead and forego asserting that right. The Second Circuit did not view the retroactive overruling of *Stein* as *ipso facto,* resulting in the automatic vacatur of all pleas in all

cases where coerced confessions had in fact been obtained (A. 120), much less in all cases where a plea was entered during the *Stein* era.

It is true that any person who had a coerced confession claim during the *Stein* era was confronted with a constitutionally defective procedure for contesting it at trial; however, the Second Circuit clearly limited its decision to grant a hearing only in those cases where it was specifically alleged, and supported by other evidence, that the coerced confession together with the coercive effect of the *Stein* procedure was the prime inducement for the plea.

In this respect, the Second Circuit's is no different than *Johnson* v. *New Jersey, supra,* 384 U.S. 719, 730, because the Circuit merely held that the alleged violation of constitutional rights, and the inadequacy of the forum for asserting those rights, is "simply another factor" to be taken into account in determining the voluntariness of the plea (A. 119).

Despite this, the petitioners have interjected the argument that the Second Circuit's decision permitting defendants, competently represented by counsel who allege their pleas were nonetheless based upon a coerced confession to have hearings, should not stand because *Jackson* v. *Denno, supra,* should not be retroactively applied to guilty plea cases; while in the same breath, conceding that "(i)ndeed, the issue is not strictly one of retroactivity" (Pet. Br. 47).

We will address ourselves to the other justifications advanced by petitioners for asking this Court to make a non-retroactivity ruling in a case where "the issue is not strictly one of retroactivity."

The first argument is that *Jackson* is retroactive in the trial situation because that decision went to the integrity of the fact finding process, but that *Jackson* had no impact where there has been a plea because "the fact finding process is limited to the defendant's admission in open court that he is guilty of the crime to which he is pleading" (Pet. Br. 48).

If a defendant was coerced into confessing his guilt to the police and then coerced into pleading guilty because *Stein* gave him no fair way to challenge the confession at trial (and New York gave him only limited access to its appellate courts), the in-court admission of guilt is as unreliable as the primary confession which motivated it. The in-court admission cannot be taken as an isolated instant in time, divorced from the unreliability of coerced confession which produced it. If the confession was coerced, and the plea based on the confession, then the in-court admission was based upon a declaration from which no civilized forum will infer guilt. When so predicated, the fact that the in-court admission was made in a court room rather than in the back room of a precinct house, does not establish its integrity (see *supra* Point I).

The second prong of the petitioners' argument—the prosecutor's reliance upon *Stein* (Pet. Br. 48-9 and 52-3)—is irrelevant where the constitutional error goes to the integrity of the fact-finding process itself. *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968).[40]

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[40] The *Stein* rule, like the rule in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957) had been under attack since its inception. (See *Jackson* v. *Denno*, *supra*, 378 U.S. at 382 n. 10 and Note, *supra*, 39 N.Y.U. L. Rev. 78.) Moreover, the prosecutor's "good faith" in the plea situation where there was an allegedly coerced confession cannot be as readily assumed as it can in the trial situa-

Moreover, the reliance argument can be answered in another way. In *Harrison* v. *United States, supra,* the Court stated:

> "the exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law." (392 U.S. at 224 n. 10.)

In cases where the guilty plea, after a hearing, is found to be based on a coerced confession, vacatur of the conviction deprives the State of nothing to which it had lawful claim.

The third argument is that the effect of the Second Circuit's decision upon the administration of justice would be

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tion (Pet. Br. 48). In the trial situation, the prosecutor could introduce an allegedly coerced confession into evidence and rely upon the *Stein* procedure to insure that the confession would not contaminate the verdict and hence the conviction, though even in this situation, he had the windfall of the jury hearing the confession though they might deem it coerced. In the plea situation, the allegedly coerced confession could be used to get a conviction provided the defendant bargained away his right to go to trial. See Altschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. Chi. L. Rev. 50, 80-83 (1968). To the extent the potential inadmissibility of the confession played a role in the prosecutor's willingness to compromise the case, then actual bad faith would be present. Contrary to the petitioners' assertions (Pet. Br. 56), the State is entitled to *no* presumption that it would neither introduce the illegal evidence at trial or use it to secure the plea because to so presume ignores not only the realities of the plea bargaining situation but also every case cited by petitioners (Pet. Br. 43-44) where convictions were reversed because the State had in fact obtained and introduced an involuntary confession.

"staggering". This argument is also made in the *amicus* brief filed by the New York County District Attorney where the full parade of horribles is once again brought out for display.

Judge Kaufman addressed the major part of his concurring opinion below to this consideration (A. 131 *et seq.*) and little can be added to what he has written.

We make only two observations: First, we have cited in the appendix to this brief a number of cases arising in other circuits and states, where collateral attacks upon pleas allegedly based on coerced confessions have been permitted. These jurisdictions have lived with the "floodgates" (Pet. Br. 54) open for the past several years, and have not been besodden by the now predicted (Pet. Br. 54; Amicus Br. 8-9) tidal wave of writs. Second, the court below recognized that its decisions in these three cases would have greatest impact in cases raising the claim of coerced confession from the era that began with the Wickersham report (IV National Commission on Law Observance & Enforcement, Report on Lawlessness in Law Enforcement 21931) and produced cases like *Spano* v. *New York, supra, Leyra* v. *Denno, supra, Fay* v. *Noia, supra* (see *United States ex rel. Caminito* v. *Murphy,* 222 F.2d 698 (2nd Cir., 1955), cert. den. 350 U.S. 896 (1955));[41] an era in which the prosecution had argued "that law enforcement methods such as those under review are necessary to uphold our laws." *Chambers* v. *Florida,* 309 U.S. at 240. And, indeed the 100 cases, selected at random from the files of the New York County District Attorney's Office (Amicus Br. A. 1-4) all arose during the last decade of that

[41] See generally, Paulsen, *The Fourteenth Amendment and the Third Degree,* 6 Stan. L. Rev. 411 (1954).

era. If any one of these 100 cases involve a claim that the defendant was forced by brutality or psychological coercion to confess and that his conviction was based upon that confession, and that claim can be proved[42] at a hearing, the game has been worth the candle. Moreover, the rights afforded by the Constitution are personal rights "which the State must respect, the benefit of which every person may demand." *Hill* v. *Texas,* 316 U.S. 400, 406 (1942). The fact that "the facilities of the courts, prosecutors, police and defense bar [are] already over-taxed . . ." (Amicus Br. 9) is an argument that should go to the legislatures in support of more adequate funds, not an argument that should come to this Court as a reason for withholding justice if justice is both owing and overdue.

3. Williams

Williams alleged that he confessed to a crime he did not commit after being deprived of food and sleep and

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[42] Both the petitioner and the *amicus* make much of the argument that reconstruction of the record after the fact of conviction is a difficult one (Pet. Br. 49, Amicus Br. 9). It would appear that the defendant has the burden of proving by a preponderance of the evidence both the fact that his confession was coerced and the fact that his plea was based upon the confession, since this is a collateral attack upon a judgment of conviction, see *Walker* v. *Johnston, supra,* 312 U.S. at 286. Thus the difficulty of reconstruction is primarily a defense problem. Moreover, any collateral proceeding to determine whether certain off-the-record events have occurred entails this same difficulty. Yet the writ of error *coram nobis,* designed expressly for this purpose, is still permitted in New York and reaches situations where the task of reconstruction is far more difficult than it would be here. See for example *People* v. *Boundy,* 10 N.Y.2d 518 (1962) (*coram nobis* hearing ordered on issue of defendant's sanity which had not been developed at the time he pleaded guilty). See also *United States ex rel. La Near* v. *Warden,* 306 F.2d 417 (2d Cir. 1962) (*habeas corpus* hearings ordered on the constitutionality of a prior out-of-state conviction, despite the fact that the evidence necessary to prove or disprove the allegation was not in the jurisdiction of the hearing court).

physically threatened. According to the allegations of the petition, court-assigned counsel, who was thereafter appointed to represent him was inadequate and incompetent. Williams only entered the guilty plea because his lawyer, although knowing of a valid alibi defense, told him the plea was to a misdemeanor. Williams further alleged that outside of the illegal confession, there was no evidence[43] connecting him to the commission of the crime, and argued that he did not waive his right to challenge the confession by entering the plea because he could not have received a fair determination on the issue of voluntariness of the confession or a fair trial under the then existing New York trial procedure.

According to Williams' allegations both the alleged incompetence of counsel and the alleged inability to receive a fair determination of the coerced confession issue played a role in his determination to plead guilty. The Second Circuit looked to both these factors to supply the nexus between the coerced confession and the guilty plea (A. 176-77).

If assigned counsel refused to prepare for trial on the alibi defense, this was a compelling indication that his preparation on the confession issue would also be perfunctory. As we have argued in Richardson's case (*supra*, pp. 27-9) without the effective assistance of counsel, the choice between trial or plea was not a fair choice between viable alternatives. Moreover, without the effective assistance of counsel the initial coercion producing the confes-

[43] In his dissenting opinion, Judge Lumbard states that undoubtedly the victim could have identified her assailant. However, in New York, a conviction for rape or lesser included crimes cannot be had upon the uncorroborated testimony of the victim. N. Y. Penal Law, 1909, §2013.

sion would remain unbroken since no neutral agent was interposed between the coerced confession and the plea itself, and hence there would be no break in the stream of events sufficient to insulate the plea from the effect of all that went before.

Even if counsel were willing to contest the confession at trial, the *Stein* procedure would have prevented a reliable determination of the voluntariness issue, and would have offered no assurance that if the jury found the confession involuntary, they would not use it as evidence of guilt (see *supra,* pp. 34-7). Like Dash's, this case was a close one on its facts. Even if the complainant could make a positive identification, the confession was necessary to supply the necessary corroboration under New York law, New York Penal Law, 1909, §2013. If the witness could not identify him, the confession was an absolutely essential element of the prosecution's case. In such a case, even if the jury found the confession coerced but also found that the crime had been committed, the kind of tension between not using a coerced but true confession to convict and thus permitting an obviously guilty man to go free described in *Jackson* v. *Denno, supra,* 378 U.S. at 382 was palpably present.

In this case, the respondent made two allegations, either of which, if proved at a hearing, would establish that his plea of guilty was "based on" a coerced confession and hence that his conviction had been obtained in violation of his right to due process of law, therefore the court below did not err in ordering a hearing on this claim.

POINT III

In Each Case, the Respondent Has Made Allegations Independent of the Confession Claim Which Are Not Patently Frivolous or False on Consideration of the Whole Record, and Which if Proved at a Hearing Would Entitle Him to Relief Under the Fourteenth Amendment.

In Points I and II above, we have argued that the court below correctly held that the respondents were entitled to a hearing upon their allegations that their pleas of guilty were based upon coerced confessions. However, the decisions below remanded each case for a hearing upon other allegations, independent of the coerced confession claim (Dash, A. 125; Richardson, A. 171-2; Williams, A. 177).

In each case the respondent has alleged other facts, independent of the confession claim, entitling him to a hearing on the ground that his guilty plea was involuntary and hence obtained in violation of his Fourteenth Amendment rights.

1. Richardson

In addition to the coerced confession claim, Richardson alleged that he was represented by incompetent court assigned counsel who conferred with him for only ten minutes in a capital case and who told him he would get the same amount of money for representing him regardless of the outcome.

Petitioners sought to controvert these allegations with the affidavit of assigned counsel prepared in 1963 and submitted to the New York Supreme Court in order to receive compensation for his services to Richardson. It states

merely that counsel studied the reports finding the defendant sane and "the law dealing with the subject of insanity" and had "conferences with the defendant and with each other relative to preparations for trial as well as relative to the advisability of taking . . . a compromise plea" (A. 106). The reference to "conferences" is vague in the context in which it appears. Was there one conference with Richardson and another with co-counsel? Was there one conference with Richardson relative to trial preparation and another with co-counsel concerning the advisability of taking a plea? The possible combinations are infinite and do not invariably add up to the fact that counsel is stating he had more than one conference with Richardson relative to trial preparation. It cannot be said, as the petitioner argues, that Richardson's allegation that his attorney barely conferred with him "is belied by the attorney's affidavit" nor can it be said that the affidavit conclusively demonstrates "that both assigned attorneys thoroughly examined the possibilities of going to trial" (Pet. Br. 38).[44]

Even assuming that the attorney's affidavit flatly contradicted Richardson's allegation, this merely raises an issue of fact for a hearing. *Machibroda* v. *United States, supra,* 368 U.S. 487, 494; *Walker* v. *Johnston, supra,* 312 U.S. at 284-6.

The allegation of inadequate assistance of counsel is one, which if proved at a hearing, would entitle respondent to relief. Since *Powell* v. *Alabama,* 287 U.S. 45 (1932) it has been "assumed by most courts to be axiomatic that

[44] It cannot even be said that the affidavit shows that the attorney thoroughly examined his own affidavit, as he dated it one month prior to the plea and stated that the defendant was sentenced fourteen days before sentence was actually imposed.

any right to representation [by counsel] involves a right to 'effective' or 'adequate' assistance." Waltz, *Inadequacy of Trial Representations as a Ground for Post Conviction Relief in Criminal Cases,* 59 N.W. L. Rev. 289, 292 (1965) and cases cited therein. While some aspects of the right to the effective assistance of counsel have posed hard questions, no court decision or legal commentator has ever challenged Mr. Justice Sutherland's observation in *Powell* that "consultation, thoroughgoing investigation and preparation" are "vitally important" to the defense of a criminal case. 287 U.S. at 57.

In *Brooks* v. *State of Texas,* 381 F.2d 619 (5th Cir. 1967), the writ was granted after a hearing in which it was found that the petitioner's attorney only consulted with him for some fifteen to twenty-five minutes before trial and in *Wilson* v. *Rose, supra,* 366 F.2d 611, 613 the writ was granted where a hearing established that, prior to advising his client to plead guilty, the defendant's attorney "did not discuss possible defenses with appellee; indeed he did not discuss the facts of the case with appellee at all. Appellee's attorney testified that he listened to appellee's story and to the complaining witness' testimony at the preliminary examination (which appellee told him was not true), but made no effort to investigate either the factual circumstances of the case or the applicable law; he examined no witnesses; he did not examine the police reports, nor the complaining witness' prior statements to the police." In *Wilson,* the court stated that a collateral attack on a judgment must be sustained in a guilty plea case "where, as in this case, counsel was available but his performance was inadequate." 366 F.2d at 615. This is Richardson's claim in this case, and since no state court hearing

had been held upon his allegation, the decision below granting him the opportunity to prove his allegations in a federal hearing was correct under *Townsend* v. *Sain*, *supra*, 372 U.S. at 312-13.

2. Dash

In his petition for the writ, Dash alleged his plea was induced not only by the coerced confession but by a threat by the trial judge to impose the maximum possible sentence if he went to trial. This ground was "dismissed from consideration by the [district court] judge because the report of the state court proceedings, *People* v. *Dash*, 16 N.Y.2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant" (A. 124).

The court below was correct in holding that this allegation stated a valid claim for relief because a conviction based upon a plea induced by threats is involuntary. *Waley* v. *Johnston*, *supra*, 316 U.S. 101; *Machibroda* v. *United States*, *supra*, 368 U.S. 487; *United States ex rel. McGrath* v. *LaVallee*, 319 F.2d 308 (2nd Cir., 1963); *United States* v. *Tateo*, *supra*, 214 F.Supp. 560.

The court below was also correct in remanding the case for a hearing upon the allegation.

First of all, the district court below had not called for or examined the state court record. It merely referred to the New York Court of Appeals opinion as categorically refuting the claim and rested its decision upon this basis (A. 37). Even before *Townsend* v. *Sain*, *supra*, 372 U.S. 293, it was error for the district court to dismiss a *habeas* application by merely relying upon the facts and conclusions

stated in a state court opinion without making any examination of the state court record whatsoever. *United States ex rel. Jennings* v. *Ragen*, 358 U.S. 276 (1958).

Since no examination of the state court record had been made, a remand was clearly necessary if only for this limited purpose.

However, the state *coram nobis* proceeding in which this claim was raised was denied without a hearing.[45] Clearly a triable issue of fact had been raised by the petition and the assistant district attorney's affidavit in denial. *Machibroda* v. *United States, supra*, 368 U.S. at 494-5. Under *Townsend* v. *Sain, supra*, a hearing was required because there were off the record facts in dispute and the state court had not "after a full hearing reliably found the relevant facts." 372 U.S. at 312-13.

The decision below remanding for a hearing upon the allegation that the plea was coerced by threats of the trial judge was correct and should be affirmed.

3. Williams

In his petition for the writ, Williams alleged that he was out of the state when the crime was committed, but that his attorney (later disbarred) knowing of this, talked him into pleading guilty and misled him into thinking he was pleading guilty to a misdemeanor rather than a felony. He alleged he was not told of the nature of his plea or the nature and meaning of the charge when he entered the plea.

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[45] The two dissenting judges in the New York Court of Appeals had voted to remand for a hearing since "the petition raises a triable issue of fact as to whether the guilty plea was induced by coercion . . ." *People* v. *Dash, supra*, 16 N.Y.2d at 494-5.

The petitioner does not discuss these allegations other than to deprecate the inartful manner in which this *pro-se* petitioner raised them (Br. 8, 38).[46] The petitioner also does not mention the exhibit attached to its own answer in the district court below (A. 65-6) which shows that Williams had once before been identified in New York when he was in jail in Ohio.

The court below held that:

> "If [Williams] pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether [he] was adequately represented by counsel when he entered his guilty plea. '[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist'. *Jones* v. *Cunningham*, 313 F.2d 347, 353 (4th Cir.) cert. den. 375 U.S. 832 (1965). See also *Quarles* v. *Balcom*, 254 F.2d 985 (5th Cir., 1966) . . ." (A. 177).

To the same effect: *United States* v. *Rogers*, 289 F. Supp. 726, 729 (D. Conn., 1968) where a plea was vacated pursuant to a 28 U.S.C. §2255 motion where counsel failed

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[46] Petitioner's statement that Williams first raised this claim eight years after conviction is unsupported by the record. Williams had brought six collateral proceedings prior to the time he filed the federal writ and since none of those petitions were before the district court below, it is impossible to tell when the claim was first raised. In any event, the length of time is irrelevant. *Pennsylvania ex rel. Herman* v. *Claudy*, *supra*, 350 U.S. at 123. Appellant also attacks the allegation on the ground it was fully spelled out in the brief annexed to the petition, rather than in the petition itself. That *pro-se* petitioners are not chargeable with the technical skill of the trained attorney is well established. *Price* v. *Johnston*, 334 U.S. 266 at 292 (1948).

to investigate an alibi defense and the court found that counsel "despite defendant's protestations of innocence . . . proceeded to recommend a guilty plea without any effort on his part to ascertain whether defendant was in fact guilty and without any warning by counsel to defendant that a guilty plea should be entered only if defendant really was guilty."

The decision below granting a hearing on the competence of counsel claim is clearly correct, under *Townsend* v. *Sain, supra,* since the state court did not give Williams a hearing upon this allegation.

The court below also held that "if petitioner was misled by his attorney into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the guilty plea was made intelligently" (A. 177). This is no novel doctrine of law. See *Anders* v. *Turner, supra,* 379 F.2d 46, 48-9 and *Pilkington* v. *United States, supra,* 315 F.2d 204, 207.

The petitioner never controverted this allegation and supported it, inferentially, by its Exhibit A (A. 65-6) showing that Williams had never before been convicted of a felony. Nor did the petitioner produce the minutes of pleading to controvert Williams' allegation that the trial court never told him he was pleading to a felony.

Since the allegations as to the incompetence of counsel and the misapprehension of the nature of the plea were uncontroverted by the record, and not patently false or frivolous and since there had been no state court hearing on the claim, the court below did not err in ordering a hearing upon the petition.

Conclusion

In each of the three cases here for review, the respondent made allegations of off-the-record facts which called into question the constitutionality of his plea of guilty. These allegations were first made in the state courts of conviction, but the state *coram nobis* petitions were denied without a hearing in all of the cases. Because of the decision in *Townsend* v. *Sain, supra,* 372 U.S. 293, the court below was obliged to decide whether to hold an evidentiary hearing on these allegations (A. 114). In each case, it determined that such a hearing was necessary.

The court below held that a hearing was necessary where it is alleged that a plea of guilty is not voluntary because it was induced by the existence of threatened use of an allegedly coerced confession (A. 114), and where it was further alleged, with particularity, the manner in which the confession rendered the plea involuntary (A. 120). In each case, the court of appeals considered the specific allegations in the petition, and found that a sufficient nexus between the allegedly involuntary confession and the plea had been alleged to exist so that a hearing was warranted.

The court below also considered the allegations made in each case of other facts, in addition to the coerced confession claim, which, if proved at a hearing, would render the plea unvoluntary. In each case, the court below held that under *Townsend* v. *Sain, supra,* a hearing was necessary.

For the reasons stated in the points of argument above, the respondents respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be affirmed in each case.

Respectfully submitted,

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